Nos. 28, 38, 43, 44

OCT 15 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NORTHERN LINES MERGER CASE

UNITED STATES OF AMERICA, Appellant

v.

INTERSTATE COMMERCE COMMISSION, et al.

CHARLES E. BRUNDAGE, et al., Appellants

v.

INTERSTATE COMMERCE COMMISSION, et al.

CITY OF AUBURN, Appellant

v.

INTERSTATE COMMERCE COMMISSION, et al.

LIVINGSTON ANTI-MERGER COMMITTEE, Appellant

v.

INTERSTATE COMMERCE COMMISSION, et al.

On Appeals from the United States District Court for the District of Columbia

---

REPLY OF LIVINGSTON ANTI-MERGER COMMITTEE

Valentine B. Deale
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Livingston
Anti-Merger Committee

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

ARGUMENT 2

I. The Livingston Anti-Merger Committee Has Standing To Raise Both the Issue of Railway's Title and the Issue of Non-Compliance with Statutory Provisions of Railroad's Federal Charter 2

A. Interests of Committee in Merger Proposal 3

B. Relevant Statutory Provisions 5

C. Committee's Selection of Arguments 7

1. Validity of Title Question in Present Appeal 8

2. Validity of Question of Statutory Prohibitions Against Merger and Mortgage in Present Appeal . . . 9

II. As a Matter of Its Jurisdiction and Public Interest, the Commission Is Obliged To Ascertain Who Owns the Federally Granted Franchise and Right of Way Included in the Proposed Merger 10

III. Railroad Continues To Own the Federally Granted Franchise and Right of Way Used and Operated by Railway Since the Foreclosure Proceeding in 1896 13

A. Nature of "Foreclosure" Proceeding 13

B. Views of Congress 16

C. Views of Courts 16

D. Two Attorney General Opinions 17

IV. The Proposed Merger and Related Mortgage of Railway Are Barred by Railroad's Federal Charter 18

A. Character of Federal Charter's Prohibitions Against Merger and Mortgage 18

B. Federal Charter Provisions v. Commission's Authority 20

CONCLUSION 22

TABLE OF CITATIONS

CASES:

Civil Aeronautics Board v. State Airlines, Inc., 338 U.S. 572 ... 10

Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 ... 10

Louisville and Nashville R. Co. v. United States et al., 282 U.S. 740 ... 19

Marine Space Enclosure, Inc. v. Federal Maritime Commission, et al., ___ U.S. App. D.C. ___, ___ F.2d ___ (C.A.D.C., July 30, 1969) ... 10

Northern Pacific Ry. Co. v. Boyd, 170 Fed. 779, *aff'd* 177 Fed. 804, *aff'd* 228 U.S. 482 ... 13, 15, 17

Platt v. Union Pacific R. Co., 99 U.S. 48 ... 14

St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298 ... 11

Schwabacher v. United States, 334 U.S. 182 ... 12

Texas & New Orleans R. Co., et al. v. Brotherhood of Railroad Trainmen, et al., 197 F.Supp. 348, *aff'd* 307 F.2d 151, *cert. denied* 371 U.S. 952, *rehearing denied* 375 U.S. 871 ... 20

United States v. Northern Pacific R. Co., 95 Fed. 864, *aff'd* 177 U.S. 435 ... 19

FEDERAL STATUTES:

Act of July 2, 1864, 13 Stat. 365 ... 2, 9, 15, 19

Joint Resolution of May 31, 1870, 16 Stat. 378 ... 18

Act of Feb. 28, 1919, 40 Stat. L. 1204 ... 16

Act of June 25, 1929, 46 Stat. 41 ... 16

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*:

Sec. 5(2)(a) ... 11, 20

Sec. 5(2)(b) ... 5, 11

Sec. 5(2)(c) ... 6

Sec. 5(2)(d) ... 11

Sec. 5(11) ... 18, 20, 21

Sec. 20a(7) ... 18, 20, 21

Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* 20

Railway Labor Act, 45 U.S.C. 151 *et seq.* 20

5 U.S.C. Sec. 702 6

28 U.S.C. 2321 6

28 U.S.C. Sec. 2323 5

LEGISLATIVE MATERIALS:

Printed Hearing Record, Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, 68th Congress, pursuant to Public Resolution No. 24, approved June 25, 1924 . . . . . 14, 15

House Report No. 1813, 87th Cong., 2d Sess. 21

Senate Report No. 1565, 87th Cong., 2d Sess. 21

MISCELLANEOUS:

21 Op. Atty. Gen. 486 (1897) 17

25 Op. Atty. Gen. 401 (1905) 17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

Northern Lines Merger Case

No. 28

United States of America, Appellant

v.

Interstate Commerce Commission, et al.

No. 38

Charles E. Brundage, et al., Appellants

v.

Interstate Commerce Commission, et al.

No. 43

City of Auburn, Appellant

v.

Interstate Commerce Commission, et al.

No. 44

Livingston Anti-Merger Committee, Appellant

v.

Interstate Commerce Commission, et al.

On Appeals from the United States District Court for the District of Columbia

---

REPLY OF LIVINGSTON ANTI-MERGER COMMITTEE

The Interstate Commerce Commission and the Great Northern Railway, et al., each filed a brief (ICC Br. and Ry. Br.) in response to the brief of the Livingston Anti-Merger Committee. The principal points raised in their briefs in the context of the Committee's basic contentions are considered below.

ARGUMENT

I. THE LIVINGSTON ANTI-MERGER COMMITTEE HAS STANDING TO RAISE BOTH THE ISSUE OF RAILWAY'S TITLE AND THE ISSUE OF NON-COMPLIANCE WITH STATUTORY PROVISIONS OF RAILROAD'S FEDERAL CHARTER [1]

Through its hearing examiner whose report it adopted (A. 496), the Commission addressed itself, however limitedly, to the merits of the Committee's basic contentions in this appeal (A. 1005-1008). In the proceedings for judicial review, the Commission introduces the new argument that the Committee does not have standing to press such contentions. The Commission now claims that the Livingston Anti-Merger Committee has no standing either to challenge Railway's title to the franchise and right of way federally granted to Railroad or to allege non-compliance with statutory provisions of Railroad's federal charter (ICC Br. 139-140). The Commission argues that the Committee is in no way connected with the title dispute, whether as stockholders or otherwise, that the Committee cannot derive standing merely from its participation in the administrative proceedings, and that the Committee possesses no independent definite legal interest sufficient to contest alleged non-compliance with provisions of Railroad's federal charter (*ibid.*).

The Commission's argument is faulty. Reason, statutory authority, and case law combine to secure the Committee's entitlement to press its basic contentions in the course of developing the primary issues that the Commission acted beyond its jurisdiction and approved a transaction specifically prohibited by existing federal law. The Committee's position is fortified by the fact that its basic contentions

---

[1] As in the Committee's brief, "Railway" refers to Northern Pacific Railway Company, one of the merger applicants, and "Railroad" refers to Northern Pacific Railroad Company, a federal company chartered by the Act of July 2, 1864, 13 Stat. 365 and not a merger applicant.

involve considerations of public interest transcending its own interests in the merger proposal.

A. Interests of Committee in Merger Proposal

The Committee's interests in the merger proposal which warrant its participation in the administrative proceeding and in the appeals to the court below and to this Court are derived from the fact that its members, living in small urban and rural communities[2] mainly served by one railroad and one railroad only, namely, Railway, are intimately concerned with the adverse social and economic impact upon themselves and their communities which the merger is expected to leave in its wake should it become a reality. This concern is spelled out in the testimony of the Committee's witnesses in the administrative proceeding.[3]

---

[2]Chairman Warren R. McGee described the purpose and character of the Livingston Anti-Merger Committee in his testimony at the administrative proceeding (Ex. 206, p. 1 - Tr. 14015): "I am speaking as chairman of the Livingston Anti-Merger Committee, a nonprofit organization, organized in December 1960 for the sole purpose of trying to disseminate information to all interested parties, and present testimony to the ICC relative to our position, which is opposing the proposed merger of the NP-GN-CB&Q-SPS. This organization is supported by voluntary contributions only, and our contributors are located in Auburn, Washington; Helena, Livingston, Laurel, Billings, Forsyth, Glendive in Montana; Dickinson, Jamestown and Fargo, North Dakota; East Grand Forks and Staples, Minnesota, representing 156 businesses in Livingston, 10 in Helena, 15 in Glendive, and over 500 interested citizens."

[3]Identification of the Committee's nine witnesses on the adverse social and economic impact of the merger and brief notations of the thrust of their evidence follow: *Mr. McGee*, long time Livingston resident and conductor on the Northern Pacific (NP) since 1945, emphasized with a supporting analysis the prospects for poorer rail service to small communities along Railway's line should the merger be allowed (Ex. 206, Ex. 207 - Tr. 14015); *Mr. Sullivan*, NP locomotive fireman and engineer almost continuously since 1941, stressed the adverse economic consequences to communities of loss of payroll of NP employees transferred or unemployed, and of anticipated abandonment of rail service once the merger is approved

The economy of these communities is heavily dependent upon Railway. Changes in Railway's mode of operation can be critical to the well-being of the communities, not only for the immediate future but also for a long time thereafter.

(Ex. 208, Ex. 209 - Tr. 14036); *Mr. Wanek*, president of a retail pharmacy in Livingston and past president of Livingston Chamber of Commerce, recited disappointing experience of the business community with previous economic assurances from NP officials and explained misgivings about current NP assurances, stressing estimated job losses in Livingston from the merger (Tr. 14038-14044); *Mr. Harper*, conductor-brakeman on the NP and one of two elected State Representatives from the Livingston area, i.e., Park County, presented a summary of the local economy which showed NP as the source of Livingston's main industry payroll (employing about 838 workers with an annual payroll of $4,332,000 in a city of 8,069 population) and as a main source of tax revenue (county property evaluation at $38.2 million with NP property valued at $5.2 million); he stressed the need of Livingston and the outlying communities to have better rather than curtailed NP transportation service, and he related his opposition to the merger to adverse effects upon his community on account of job losses, tax increases and frustration of opportunity for economic expansion (Tr. 14045-14048); *Mr. Nell*, a lifelong resident of Livingston, engaged in real estate business and president of the Livingston Board of Realtors, focused his testimony on the merger as a cause for depressing real estate values (Tr. 14049-14051); *Mr. Summer*, who has a floor covering and ceramic tile business in Livingston, expressed his opinion that once NP is relieved of competition through the merger businessmen in the Livingston area who are customers of NP will find NP harder to deal with and their existing difficulties in settling claims with NP will worsen (Tr. 14051-14053); *Mr. O'Hair*, who has been engaged in the livestock business in the Livingston area for the past 30 years, explained his opposition to the merger in terms of anticipated poorer rail service for livestock shipments (Tr. 14054-14055); *Mr. Parriott*, co-owner of the Livingston Hardware Company and former president of the Livingston Chamber of Commerce, spoke of payroll losses in the community expected from the merger with an adverse impact upon local communities over the years and of possible damage to a distribution center like Billings, which serves the Livingston area, from having to rely on one non-competitive rail line (Tr. 14056-14058); and *Mr. Ormundsen*, Mayor of Livingston, testified that by unanimous vote the City Council at a meeting on June 18, 1962, voted its opposition to the merger (Tr. 14077-14078).

What the Commission and the railroads seeking merger authorization might characterize as greater operating efficiency and better service for large industrial and commercial centers at the eastern and western termini of the railroad lines is translated to these small, in-between communities to mean lower employment, poorer transportation service and depressed economic opportunity. More and more they become a place where the train passes through rather than a place which the train serves.

B. Relevant Statutory Provisions

Section 5(2)(b) of the Interstate Commerce Act provides in part:

> "(b) Whenever a transaction is proposed under subdivision (a) of this paragraph [e.g., a rail merger] . . . the Commission . . . shall afford reasonable opportunity for interested parties to be heard. . . . and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. . . ."

The Commission's public hearing on the Northern Lines merger proposal was in fulfillment of statutory requirement and the Committee's participation therein as an "interested" party was grounded on statutory right.

Particularly pertinent provisions of section 2323 of Title 28, United States Code, relating to procedure in the district courts respecting orders of the Interstate Commerce Commission, state:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties on their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> "Communities, associations, corporations, firms and individuals interested in the controversy or

> question before the Commission, or in any action commenced under the aforesaid sections [inclusive of Section 2321 of Title 28, providing for procedure to set aside ICC orders] may intervene in said action at any time after commencement thereof."

The section also assures to such party or intervenor within its coverage the right to pursue his case regardless of any disposition of related action made by the Attorney General. The right secured under this section is aborted if a party or intervenor with a clear interest in a Commission order may not pursue the issue of the Commission's jurisdiction or of the Commission's approval of a transaction prohibited by federal law.

The right of review under the Administrative Procedure Act, as now set out at 5 U.S.C. 702, is also in point:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Once more, this statutory assurance of judicial review of agency action is sapped of meaning if an "adversely affected" or "aggrieved" person may not challenge administrative action on the basis that it is *ultra vires* to the agency or defeative of existing federal law.

A further relevant statutory provision, section 5(2)(c) of the Interstate Commerce Act, enumerates four considerations which, among others, the Commission is obliged to give weight in passing upon the proposed merger.

> "In passing upon any proposed transaction under provisions of this paragraph [e.g., a rail merger], the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

The above statutory considerations, including the "among others" factor, readily embrace the Committee's interests as enumerated at the administrative hearing. The Committee's stake in the impact of the proposed transaction upon the well-being of small communities served by Railway is particularly noted in light of consideration (1). For the small communities along the way to the big cities are also part of the "public" whose interests the Commission is charged with looking after.

The point here is that the interests of the Livingston Anti-Merger Committee in the proposed merger are not remote, tenuous or academically speculative interests; rather, the interests which anchor the Committee's standing to oppose the Commission's merger authorization orders are immediate, real interests which are recognized and accommodated by statutes.

C. Committee's Selection of Arguments

In their briefs, the Interstate Commerce Commission and Railway correctly observed that the Livingston Anti-Merger Committee has dropped its economic impact argument (ICC Br. 135; Ry. Br. 3, fn. 3). However, contrary to the suggestion somewhat implied in their observations, the abandonment of the Committee's economic impact argument in this appeal is not to be equated with any concession on its part as to the merits of that argument or any abandonment of its economic interests in the proposed merger. The Committee simply has chosen to move forward with its opposition to the merger by relying exclusively on other issues raised by itself in the administrative proceeding which, in its judgment, have more potential on appeal.[4] Though the prospective injury from the merger to the Committee

[4]With respect to the substantive issues in this appeal, see the testimony of the Committee's witness Mr. Lishman, a Washington, D. C. attorney and an expert in the history of Railroad and Railway (Tr. 14060-14067), his prepared statement which the hearing examiner refused to admit in evidence (Ex. 210–Tr. 14066), and the Committee's brief dated January 4, 1963 (R. 123).

members and their communities is great so far as they are concerned, it is estimated that such injury of itself may not be regarded as sufficiently weighty to tip the scales in an overall balancing of the economic advantages and disadvantages of the merger. Thus the Committee focuses on the threshold issues of the Commission's jurisdiction over the merger (inextricably tied to the title question) and of the current relevance of congressional impositions in Railroad's federal charter.

1. *Validity of Title Question in Present Appeal*

The title question is logically subordinate to both these major issues, particularly the former one. Pursuant to the first issue, there is a jurisdictional limitation on the Commission's merger approval authority, that is, the approved merger must relate to properties owned by the merger applicants or a consenting other party. There is also the statutory requirement that in approving a merger the Commission must find that the proposed merger is within the scope of its authority, in this instance, that Railway owns (as distinguished from controls) the franchise and 2,100-mile main line right of way federally granted to Railroad. The title question, therefore, is one which must be answered in order to secure the Commission's jurisdiction and also to meet the statutory requirement of making an appropriate finding with respect thereto. It is in this context that the Committee raises the title question and under such circumstances, it is submitted that the Commission's objections to the Committee's standing to do so must be rejected.

The title question also is related to the second issue raised by the Committee, that is, that the congressional impositions in Railroad's federal charter against merger and mortgage continue to remain in full force and effect. Though the Committee holds that these impositions are binding today as legal bars to the merger regardless of whether ownership in the federally granted franchise and right of way rests in Railroad or Railway, the merits of the Committee's position are more immediately evident if ownership is vested in Railroad.

2. *Validity of Question of Statutory Prohibitions Against Merger and Mortgage in Present Appeal*

The Interstate Commerce Commission claims that the Committee possesses no "independent definite legal interest" to support the contention that the statutory prohibitions against merger and mortgage in Railroad's federal charter are legal bars to the merger authorization orders (ICC Br. 139). The Commission seemingly would permit the government alone to make such a contention on the basis that the federal charter was for the purpose of "securing, for the benefit of the United States, the use of a railroad, at appropriate times, for postal, military, and other government purposes" (*ibid.*).

To the contrary, Railroad's federal charter is not so limited in scope for it embraces the broad concept of public interest and welfare as well as support of purely governmental functions. Section 20 of the charter includes a definition of the charter's object, as follows:

> "Sec. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

Support of various governmental functions is, of course, within the public interest and welfare object of the federal charter. However, such support by no means defines or represents the boundaries of public interest and welfare embraced by the federal charter in providing for the construction and maintenance of a continuous railroad from Lake Superior to the Pacific coast.

From the standpoint of the Livingston Anti-Merger Committee, a breach of Railroad's federal charter or a frustra-

tion of its provisions is in itself an undercutting of public interest and welfare; government departments and agencies are not the sole protectors of public interest and welfare and have no exclusive right for raising issues with respect thereto; private, intervening parties in an administrative proceeding wherein the agency's determination of public interest is critical are entitled to raise issues of public interest germane to the proceeding, and indeed, that is a primary reason for allowing intervention—to make sure that matters of public interest are well considered. See *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 477; *Civil Aeronautics Board v. State Airlines, Inc.*, 338 U.S. 572, 578; *Marine Space Enclosure, Inc. v. Federal Maritime Commission, et al.*, ___ U.S.App.D.C. ___, ___ F.2d ___ (C.A.D.C., July 30, 1969, see slip report at 22).

II. AS A MATTER OF ITS JURISDICTION AND PUBLIC INTEREST, THE COMMISSION IS OBLIGED TO ASCERTAIN WHO OWNS THE FEDERALLY GRANTED FRANCHISE AND RIGHT OF WAY INCLUDED IN THE PROPOSED MERGER

The Commission and Railway both contend in their briefs that ownership of the federally granted franchise and right of way, included among the properties to be merged, is not a jurisdictional element in the exercise of its merger approval authority (ICC Br. 137-138; Ry. Br. 9-10). To support their position, they cite motor carrier cases involving the Commission's approval of small acquisitions (ICC Br. 137-138; Ry. Br. 11 and fn. 10 at 11). In these cases, the Commission correctly refused to adjudicate the legal merits of rival purchase contracts; it confined itself to deciding which was the better contract from the standpoint of the public interest and left the disputes among competing parties over their contractual rights for settlement among themselves or by a court. The Commission and Railway would extend the principle of these cases to support the argument that the Commission has no business

looking into the questions of who owns one of the main line roads in the proposed merger and what are the federal prohibitions against merger and mortgage placed upon it.

The analogy is far-fetched and it is invalidated by the differences in section 5(2)(a) of the Interstate Commerce Act as pertaining to acquisitions on the one hand and mergers on the other. Except for the properties of other parties petitioning for inclusion in the merger as provided at section 5(2)(d), a rail merger within the ambit of the Commission's authorization powers is limited to one involving properties of the merger applicants. The law does not permit an involuntary merger of rail carriers. *St. Joe Paper Co., et al. v. Atlantic Coast Line R. Co.*, 347 U.S. 298. Accordingly, even though a court would have the last word on a property ownership question, it is submitted that by the terms of the statute the Commission must face the question of who owns the properties in a proposed merger. Section 5(2)(b), requiring a finding by the Commission prior to the exercise of its merger approval authority that the proposed transaction is within the scope of section 5(2)(a), is complementary to the foregoing conclusion.

The further attack by the Commission and Railway upon the Committee's position is tied to cases wherein a merger applicant operates another road under lease or operates freight cars acquired through equipment trust, conditional purchases, or other security devices (ICC Br. 138, fn. 47, 48; Ry. Br. 10, fn. 9). These cases on their facts, involving no ownership issue at all, afford no basis of comparison with the present set of circumstances. They provided no occasion for the Commission to be even remotely concerned about any question of a merger applicant's ownership of its to-be-merged main line road and franchise therefor. Whatever elasticity of construction might appropriately be given to section 5(2)(a) to accommodate inclusion in a merger of properties not owned by the merger applicants, such as personalty and other properties incidental to or supportive of the merger, this elasticity of con-

struction cannot be stretched to include such central properties of a rail merger as a 2100-mile main line right of way and the federal franchise pertaining thereto. Otherwise the words of the statute lose their meaning.

Railway makes the further argument that since it owns substantially all of Railroad's stock and almost totally controls Railroad, the ownership question is really irrelevant. For if Railway does not own the federally chartered right of way, then Railroad owns it and Railway controls Railroad (Ry. Br. 10 at fn. 9). The argument overlooks the significance of Railroad's ownership of the main line from Lake Superior to Puget Sound. The provisions of Railroad's federal charter prohibit it from merging or mortgaging its main line without congressional consent. Railway's control of Railroad affords no basis for Railroad's violation of the statutory prohibitions.

In addition, the proposed financing of the merger calls for the issuance of consolidated mortgage bonds (A. 380 *et seq.*) which would be secured in part by the main line right of way federally chartered to Railroad. Public interest would appear to demand that the questions of who owns the federally chartered road and whether it is *ultra vires* for it to be merged or mortgaged without congressional consent be answered before any merger consummation rather than remain open and be raised later (as the lower court would allow, A. 57), such as in the course of litigation seeking to enforce the terms of bonds in default. This Court's determination that serious open questions with respect to merger financing be resolved at the outset is indicated in *Schwabacher v. United States,* 334 U.S. 182.

III. RAILROAD CONTINUES TO OWN THE FEDERALLY GRANTED FRANCHISE AND RIGHT OF WAY USED AND OPERATED BY RAILWAY SINCE THE FORECLOSURE PROCEEDING IN 1896

The Commission and Railway attack the merits of the Committee's claim of Railroad's ownership essentially on two grounds (ICC Br. 136-137; Ry. Br. 4-9). First, there was a foreclosure proceeding in 1896 purporting to transfer Railroad's title to Railway, the proceeding was a legitimate transaction free of any fraud, and it has never been set aside. And second, Congress, the courts and two attorney generals have recognized Railway's succession to Railroad's properties. For the most part, the Committee's brief anticipated these arguments.

A. Nature of "Foreclosure" Proceeding

The Committee and the appellees have no difference on the facts that there was a foreclosure proceeding, that this Court in the *Boyd* case stated the foreclosure decrees were free "from any moral or actual fraud" (228 U.S. at 502) and that the decrees have never been set aside. The difference between the parties here concerns not the form of the foreclosure or its stated freedom from fraud, but rather the substance of the transaction and in light thereof, its legal impotency for transferring title of a federally chartered railroad's right of way with its federal tax exemption and franchise.

As the Court of Appeals in the *Boyd* case indicated (177 Fed. at 817-818), the foreclosure was "a foreclosure in form and not in substance," and the foreclosure decrees and orders themselves as pertaining to Railroad's federally granted right of way and other railroad properties reserved the question, which has yet to be resolved, of the validity of the mortgages which were "foreclosed" (Liv. Com. Br. 24-28). The case against Railway's title to the federally chartered railroad properties in the merger proceeding is

additionally strengthened by the quality of inalienability which attaches to a federally chartered railroad's right of way together with its federal tax exemption and federal franchise (*ibid.* 19-20). Such property was distinguished from non-railroad properties in the foreclosure proceeding. The non-railroad properties were the subject of a completely separate foreclosure decree which included no reservation with respect to the validity of the mortgages being foreclosed. The foreclosure decree covering the right of way did include such a reservation (*ibid.* 26-27). See *Platt v. Union Pacific R. Co.*, 99 U.S. 48 at 57-58.

Railway defends the substance of the foreclosure proceeding in the following terms (Ry. Br. 9 at fn. 8):

> ". . . there is a fundamental infirmity in the claim that Railroad now owns the franchise and right of way. As the Committee notes, Railroad was indebted to the extent of at least $172 million (Liv. Com. Br. 23). These debts did not disappear into thin air. Railroad's property was taken to satisfy them in foreclosure proceedings, and it can hardly have retained title."

This oversimplified view forsakes the realities of Railroad's reorganization which took place pursuant to private plans and agreements, which were never approved by any court, among the bondholders and stockholders of Railroad under the leadership of J. P. Morgan & Company as the reorganization managers.[5] In pursuit of their objective, the reorganization managers acquired as deposits more than 90% of Railroad's stocks and bonds and after having set up Railway

---

[5]The text of the plan and agreement of reorganization of the Northern Pacific Railroad Company, dated March 16, 1896, and the text of the agreement dated July 13, 1896, between Northern Pacific and the J. P. Morgan & Company as Railroad's reorganization managers begin at page 2829 and at page 2817, respectively, in the printed hearing record of the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, 68th Congress, pursuant to Public Resolution No. 24, approved June 25, 1924 (hereinafter this record is designated as "JCC," the numbers following being page references to the record).

as their own "suitable agency" for the "ownership and operation" of Railroad's properties,[6] they turned over these securities to Railway and received in exchange $345 million of newly issued securities of Railway for distribution to Railroad's stockholders and bondholders in keeping with the formula of their reorganization plan. At the time Railway received Railroad's stocks and bonds it was a shell of a company having no assets of its own other than $4,100 in cash.[7] Under the scheme, Railroad's stocks and bonds in the hands of Railway were permitted to be treated as "substantially identical" with Railroad's physical properties,[8] thus providing a basis for the new issues of Railway's securities. The agreed upon value of Railroad's properties of $345 million was approximately twice the amount of Railroad's indebtedness.

When the foreclosure sales of Railroad's properties took place following the consent foreclosure decree there was no competitive bidding. Such was rendered impractical by the time scheduling, the restrictions on the conduct of the sales and the subordination of the purchase of Railroad's properties to Railroad's senior mortgages. Railway "bought in" Railroad's properties for $61.5 million, using as the medium of payment Railroad's own bonds which had previously been exchanged for Railway's securities. Thus, it came to pass as this Court noted in the *Boyd* case, 228 U.S. at 506, ". . . the old stockholders were still owners of the same railroad, encumbered by the same debts."

Railway's theory of its ownership of the federally granted franchise and right of way requires acceptance of what amounts to a do-it-yourself repeal of the statutory federal charter, together with the rights and obligations thereunder, by the substitution of a state charter through a private transaction which was clothed with the judicial form of a

[6] Sixth paragraph of agreement of July 13, 1896 between Railway and the reorganization Managers, JCC 2819.

[7] See copy of Railway's financial statement of July 13, 1896, filed pursuant to the laws of the State of Montana, JCC 2823.

[8] Fifth paragraph of the reorganization agreement, JCC 2851.

consent decree of foreclosure of mortgages in which the court itself reserved questions as to the validity of the mortgages so far as the right of way was concerned.

B. Views of Congress

Congress' refusals to recognize Railway's claim of title to the federally chartered right of way and franchise have already been indicated (Liv. Com. Br. 32-34). However, Railway cites the Act of February 28, 1919, 40 Stat. L. 1204, as evidence of Congress' recognition of Railway's succession to Railroad's lands and rights (Ry. Br. 7). This Act, entitled "An Act for the relief of settlers on certain railroad lands in Montana," provided for the adjustment of the grants to Railroad covering lands located in an Indian reservation. This ad hoc relief statute for the benefit of Indian wards in a limited area is no support for the contention that Congress recognized Railway's title to a 2100-mile right of way. What Congress had to say about that property and the "present title" thereto in its most recent pronouncement on the subject bears repeating. Section 4 of the Act of June 25, 1929, 46 Stat. 41, which was for the purpose of removing the title cloud upon lands belonging to the United States as a result of claims by Railroad and Railway, states:

> "Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road."

C. Views of Courts

In reply to the argument of the Commission and Railway that court decisions have secured Railway's claim of title to the federally granted right of way (ICC Br. 136-137; Ry. Br. 5-9), the Committee stands on its contention that no court ever adjudicated the issue of title between Railroad and Railway and that oft quoted "title language" in the cited court decisions is no answer to its present challenge to Railway's claim (Liv. Com. Br. 34-37).

D. Two Attorney General Opinions

Two Attorney General Opinions, namely, 21 Op. Atty. Gen. 486 (1897) and 25 Op. Atty. Gen. 401 (1905), are cited by the Commission and Railway as supportive of their claim that Railway owns the federally granted railroad by virtue of the 1896 foreclosure proceeding (ICC Br. 137; Ry. Br. 5). In the first opinion, Attorney General Harmon addressed himself to the question of whether the Secretary of the Interior should withhold from Railway patents to land grant lands to which it was assumed Railroad, except for the 1896 foreclosure proceeding, would have been entitled. The matter of right of way land was not involved as such land had already been patented to Railroad. The question was framed in terms of the argument that Railway was not entitled to the land grant lands since by virtue of the foreclosure proceeding the government had lost all of its rights in consideration of which it had given the lands. Attorney General Harmon's opinion concluded that the Secretary of the Interior was not justified in withholding the patents from Railway. The second opinion, by Attorney General Moody, generally amounted to a confirming review of the earlier opinion.

These opinions are of doubtful value so far as deprecating the merits of the Committee's position. First, the opinions concern patents to land grant lands which, from the standpoint of alienability, must be distinguished from a federally chartered railroad's right of way with a federal tax exemption and franchise; second, their appraisal of the foreclosure proceeding, without the benefit of analysis provided later by the court decisions in the *Boyd* case, reflect surface evaluations only; and third, having no occasion to do so, the opinions do not examine the merits of the title question as raised in this appeal. Moreover, the earlier opinion supports one of the Committee's basic contentions in stating that Railway took the foreclosed property "subject to all the continuing rights of the Federal Government just as the original company held it" (21 Op. Atty. Gen. at 490).

IV. THE PROPOSED MERGER AND RELATED MORTGAGE OF RAILWAY ARE BARRED BY RAILROAD'S FEDERAL CHARTER

Railway argues against the above proposition on the basis that any restraints on merger and mortgage in Railroad's federal charter control only the conduct of Railroad, a non-participant in the merger and not the conduct of Railway, and that in any event, the restraints give way to the Commission's authority under sections 5(11) and 20a(7) of the Interstate Commerce Act (Ry. Br. 11-15). With apparently limited conviction, the Commission goes along with the second part of this argument (ICC Br. 138).

A. Character of Federal Charter's Prohibitions Against Merger and Mortgage

The prohibition against mortgage appears at section 10 of Railroad's federal charter as follows:

> ". . . and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

A fair reading of the foregoing prohibition indicates that it is more than a personal limitation upon Railroad; the prohibition runs with the road. Besides the prohibition pertaining to mortgage and construction bonds directed toward "said company," that is, Railroad, there is the further prohibition against mortgage and lien which has unlimited application. The consideration here that the road itself is impressed with the prohibition against mortgage and lien complements the Committee's contention that standing in the shoes of Railroad as a buyer at foreclosure sale, Railway must accept Railroad's obligations and liabilities under the charter (Liv. Com.Br. 44-46). Moreover, the Resolution of May 31, 1870, permitting issuance of construction bonds secured by a mortgage, and the subsequent foreclosure proceeding in 1896 (even apart from its lack of substance) do not constitute any kind of repeal of the statutory provisions of the federal charter.

The fact that since 1896 Railway has issued mortgage bonds on the federally granted road without congressional consent is no evidence, as Railway implies (Ry. Br. 14), that it is justified in ignoring the statutory prohibition in the federal charter. The earlier breaches of the law does not make right any further breaches. The observation of this Court in *Louisville and Nashville R. Co.* v. *United States, et al.*, 282 U.S. 740 at 759, is relevant:

> "Long-continued practice [one rail carrier hauling another's private passenger car free or at other than published tariff rates] and the approval of administrative authorities [Interstate Commerce Commission] may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice."

The prohibition against any merger of the federally granted road is inherent in the terms of the federal charter and has been so construed in *United States* v. *Northern Pacific R. Co.*, 95 Fed. 864 at 876-877, *aff'd* 177 U.S. 435. Once again, it is submitted that the prohibition runs to the road itself, not simply to the road's federal grantee. With recognition in the federal charter that Railroad may have a successor or assign, the conclusion is fortified that whoever succeeds to Railroad is not freed from Railroad's obligations and limitations under the charter. The charter which provided 40 million acres of land for the building of a transcontinental line over the western half of the country understandably included provisions for the protection of the integrity of the line. Among those provisions are the prohibitions against merger and mortgage without congressional consent. In the proposed merger, there has been no such congressional consent.

B. **Federal Charter Provisions v. Commission's Authority**

Railway's argument that sections 5(11) and 20a(7) of the Interstate Commerce Act permit the Commission to sweep away any federal charter provisions standing as an obstacle to the proposed merger is unacceptable for the reasons presented earlier by the Committee (Liv. Com.Br. 40-49) and for the additional reasons set out below.

Contrary to the theme of Railway's argument, there are boundaries to the Commission's merger authorization power. The first one, which the Committee views as having been exceeded, is that the power extends only to transactions described under section 5(2)(a) of the Interstate Commerce Act. Even supposing, however, that the proposed merger is a section 5(2)(a) transaction, it does not follow that the plenary power of the Commission permits it to ignore charter provisions prohibiting the merger and mortgage of the federally granted road without congressional consent. It is one thing to say that the Commission's expansive authority enables parties to carry into effect an approved merger without restraints from other laws such as the Railway Labor Act and the antitrust laws,[9] where no residual rights thereunder are retained by Congress. It is altogether different to say that the Commission may ignore a statutory prohibition which Congress specifically provided could not be lifted except upon its consent, especially when the prohibition relates to the protection of federally granted property and rights over which Congress has retained special jurisdiction, both before and after conferring merger approval authority upon the Commission.

---

[9]But see *Texas & New Orleans R. Co. et al.* v. *Brotherhood of Railroad Trainmen et al.*, 197 F.Supp. 348 (S.D. Texas, 1961), *aff'd.* 307 F.2d 151 (C.A. 5, 1962), *cert. denied*, 371 U.S. 952, *rehearing denied*, 375 U.S. 871. In this case, the court rejected the railroad companies' argument that by virtue of the plenary authority of the Commission under section 5(11) of the Interstate Commerce Act, the companies, in carrying into effect a Commission approved combination, were relieved of the restraints of the anti-injunction provisions of the Norris-LaGuardia Act.

Under Railway's view of the matter, the Commission is entitled to preempt Congress' reserved right of consenting to any mortgage on the federally chartered road and to alter without congressional approval the specific terms which Congress had determined would control the road. Such extreme interpretation of the Commission's merger approval power was avoided in the case of the Texas and Pacific Railway Company's 1962 amendment to its 1871 federal charter (Liv. Com.Br. 46-49). In the course of that company's undertaking to eliminate charter restrictions upon its right to consolidate and to secure capital, the company, the Interstate Commerce Commission, the Department of Justice and the Congress all concurred in taking the legislative route. The congressional committee reports,[10] including the Commission's official view, offered no suggestion that the plenary authority of the Commission made legislation unnecessary. The opinions of this Court cited by Railway (Ry. Br. 13-14) for the purpose of discounting the value of the Texas and Pacific precedent were related to different factual situations altogether. In those cases, wherein there was quandary, reluctance of decision and change of policy on the agency's part over the interpretation of a statute as well as uneven agency relations with Congress, the Court found legislative history to be of no help in determining its own statutory construction; those cases are no measure of the usefulness or relevance here of the Texas and Pacific precedent.

Lastly, the plenary merger authorization power of the Commission does not comprehend contractual obligations between the United States government and private parties. In addition to being statutory obligations, the charter provisions are contractual obligations. However broad might be the coverage ascribed to sections 5(11) and 20a(7) of the Interstate Commerce Act, these sections do not include the right of the Commission to repudiate contractual obligations. If there is need to change the contractual

---

[10]H. Rep. No. 1813 and S. Rep. 1565, 87th Cong., 2d Sess.

obligations of the federal charter, it must be done by an amendment to the contract, that is, the federal charter, not by an unauthorized unilateral fiat of the Commission. The Texas and Pacific case makes clear the way.

CONCLUSION

For the reasons stated in the Livingston Anti-Merger Committee's main brief and those stated in this reply brief, the order of the court below should be reversed and the case remanded for the entry of an appropriate judgment permanently enjoining, annulling and setting aside the Commission's authorization of the proposed Northern Lines merger.

Respectfully submitted,

VALENTINE B. DEALE
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Livingston Anti-Merger Committee

October 1969